STATE OF MICHIGAN

COURT OF APPEALS

SYLVIA DISTEFANO, as Independent Personal Representative of the Estate of BABY GIRL DISTEFANO, Deceased, and SYLVIA DISTEFANO and JOHN DISTEFANO, Individually,

Plaintiffs-Appellees,

v

MICHIGAN WOMENS HEALTH INSTITUTE, P.C., d/b/a MICHIGAN WOMENS HEALTH INSTITUTE, and LAWRENCE B. PRUSSACK, M.D.,

Defendants-Appellants.

UNPUBLISHED
October 26, 1999

No. 204787
Oakland Circuit Court
LC No. 95-496139 NH

Before: Hoekstra, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Following a trial of plaintiffs' medical malpractice claims, a jury returned a verdict for plaintiffs totaling $225,000. Defendants appeal by right, arguing that the trial court erred in allowing plaintiffs' expert witness to testify despite the witness' lack of board certification in the same area as defendant Dr. Lawrence Prussack. The trial court's decision to admit the testimony under MCR 702 was based in part on this Court's decision in *McDougall v Eliuk*, 218 Mich App 501; 554 NW2d 56 (1996), which held that MCLA 600.2169; MSA 27A.2169 was unconstitutional. That statute required that expert witnesses in medical malpractice cases be board certified in the same area as the defendant physician, if that expert witness was going to testify as to the appropriate standard of care. Here, the witness in question was not board certified in the same area as defendant Dr. Lawrence Prussack. Since the parties filed their briefs in this case, our Supreme Court has reversed this Court's decision. See *McDougall v Schanz*, ___ Mich ___; ___ NW2d ___ (1999) (finding that MCLA 600.2169; MSA 27A.2169 is constitutional). Consequently, the trial court erred under the statute in allowing the expert witness to testify as to the standard of care. Given that our Supreme Court has resolved the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

issue of whether the trial court erred, we are left to determine whether the error requires reversal. Because we find, after reviewing the peculiar circumstances of this case, that the error was harmless, we affirm.

While pregnant, plaintiff Sylvia Distefano contracted a bacterial infection known as Group A streptococcus, which caused the premature delivery and death of her daughter. At trial, plaintiffs argued that Sylvia had told Dr. Prussack, her obstetrician, that she was suffering from a fever of 103 degrees at various points in the days leading up to the miscarriage. Defendants deny that Sylvia reported such a high fever. Neither party, however, disputes that Dr. Prussack ordered a complete blood count (CBC) for Sylvia. The CBC results showed a slightly elevated white blood count and a "left shift."[1] Ultimately, Sylvia was admitted to the hospital with a temperature in excess of 105 degrees, where doctors diagnosed her as suffering from a bacterial infection and started her on antibiotics. Shortly after her admission, she lost her baby. In addition to the miscarriage, Sylvia became gravely ill from the infection, although she eventually recovered. Plaintiffs argue that had Dr. Prussack complied with the applicable standard of care, he would have diagnosed a bacterial infection and begun treatment in time to save Sylvia's baby.

On appeal, defendants' arguments center on the fact that the trial court allowed a specialist in infectious diseases, Dr. Gary Simon, to provide expert testimony regarding the appropriate standard of care for Dr. Prussack, a board certified OB/GYN.[2] We are mindful that, at the time the trial court rendered its decision, MCL 600.2169; MSA 27A.2169 had been declared unconstitutional. Nonetheless, the Supreme Court has recently stated "that MCL 600.2169; 27A.2169 is an enactment of substantive law" and "it does not impermissibly infringe [the Supreme Court's] constitutional rule-making authority over 'practice and procedure.'" *McDougal v Schanz*, *supra*, slip op p 25. Consequently, because Dr. Simon was not a board certified OB/GYN, he was not qualified, under MCL 600.2169(1); MSA 27A.2169(1), to give standard of care testimony in this case.

We must determine what relief, if any, this error requires. This case is peculiar insofar as the trial court's ruling was correct at the time it was made but was rendered incorrect by our Supreme Court's subsequent ruling. Although there was clearly error here, nothing in *McDougall v Schanz*, *supra*, precludes application of the harmless error analysis in this sort of case. Indeed, according to MRE 103, error may not be predicated on a ruling which admits evidence unless a substantial right of the party is affected. Further,

> [a]n error in the admission of evidence is not a ground for vacating, modifying, or otherwise disturbing a judgment unless refusal to do so would be inconsistent with substantial justice. [*Davidson v Bugbee*, 227 Mich App 264, 266; 575 NW2d 574 (1997).]

See also *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

Here, we find the error was harmless, because it was not inconsistent with substantial justice. Plaintiffs offered the testimony of another expert, Dr. Sweet, who *was* a board certified OB/GYN and whose testimony substantially coincided with that of Dr. Simon. The only difference was that Dr.

Sweet's opinion that Dr. Prussack breached the standard of care relied on the presumption that Sylvia told Dr. Prussack that her fever had been going as high as 103 degrees, while Dr. Simon opined that the failure to appreciate the CBC results alone was sufficient. We note that plaintiff did not advance Dr. Simon's theory as an alternative basis for liability. In fact, defendant has not shown a single point in the record where plaintiff questioned Dr. Simon about the possibility of finding liability based solely on the blood test. Plaintiffs maintained, from their opening statement through their closing argument, that Dr. Prussack should have diagnosed the infection based on both the fever and the CBC test results. Defendant appears to have elicited Dr. Simon's theory in an effort to show that the witnesses could not agree on what constituted the appropriate standard of care. In other words, it was a trial strategy designed to highlight a potential inconsistency between plaintiff's expert witnesses, a strategy which apparently backfired.[3]

Further, we find it significant to our analysis here that defendants also produced two infectious disease specialists of their own, Dr. Zervos[4] and Dr. Lekas, both of whom opined that Dr. Prussack complied with the standard of care. Moreover, the bulk of the testimony by all of the infectious disease specialists addressed causation. Consequently, almost all of the testimony introduced at trial was proper, but Dr. Simon should not have been allowed to testify that Dr. Prussack breached the standard of care, and Dr. Zervos and Dr. Lekas should not have been allowed to testify that Dr. Prussack complied with it. Under these circumstances, we find no substantial injustice requiring reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Robert J. Danhof

[1] According to the record, a left shift is an increased percentage of neutrophils, particularly immature neutrophils.

[2] Defendants also argue that Dr. Simon was not qualified to testify under MRE 702, an argument we reject. We review a trial court's determination that an expert witness is qualified for an abuse of discretion. *Bahr v Harper-Grace Hosp*, 448 Mich 135, 141; 528 NW2d 170 (1995). Given Dr. Simon's testimony that he was familiar with the standard of care applicable for obstetricians diagnosing an infection in a pregnant patient on the basis of his own education and practice, and from teaching medicine, the trial court cannot be said to have abused its discretion by determining, pursuant to MRE 702, that Dr. Simon was qualified to give standard of care testimony under the circumstances of this case. *Bahr*, *supra* at 141-142.

[3] Plaintiffs assert the time-honored rule that reversible error cannot be error to which the aggrieved party contributed by plan or negligence. See *Phinney v Perlmutter*, 222 Mich App 513, 558; 564 NW2d 532 (1997). Defendants respond that they were simply exploring the boundaries of the witnesses' theories and that they did not introduce the error at issue. While we certainly agree that defendant was entitled to explore the witnesses testimony, we cannot agree that they are entitled to claim prejudice based on testimony they elicited.

The dissent would hold that this error was harmful and prejudicial. In reaching that conclusion, however, the dissent places no weight on the fact that this testimony only entered through defendant's questioning, a point we find important to the analysis here.

[4] Arguably, Dr. Zervos, was a fact witness. Nonetheless, he offered what was essentially expert witness testimony regarding the standard of care.